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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
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Amendment of the Commission's )  
Rules to Establish New Personal )  
Communications Services )

GEN Docket No. 90-314 ✓

To the Commission:

**WRITTEN STATEMENT OF COOK INLET REGION, INC.**

Cook Inlet Region, Inc. ("CIRI"), by its attorneys, submits this written statement in response to views expressed at the discussions on personal communications services hosted by the Commission's PCS Task Force on April 11 & 12, 1994.<sup>1</sup>

**I. INTRODUCTION**

CIRI is one of the thirteen Regional Corporations established by Congress under the terms of the Alaska Native Claims Settlement Act ("ANCSA"). 43 U.S.C. §§ 1601 et seq. (1988). CIRI is owned by approximately 6,500 Athabascan, Eskimo, Aleut, Haida, Tlingit and other Native American shareholders. A majority of those shareholders are women. Under definitions applied by the Small Business Administration CIRI's shareholders are both "socially" and "economically disadvantaged" for purposes of SBA rules and regulations.<sup>2</sup>

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<sup>1</sup> FCC to Host Panel Discussions on PCS Issues April 11-12, Mimeo No. 42480 (rel. April 4, 1994).

<sup>2</sup> The Small Business Administration ("SBA") has found African-Americans, Hispanic-Americans, American Indians/Alaska Natives, and Asian-Americans/Pacific

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Against this background — and in light of the promise of the telecommunications industry — CIRI is eager to see that minority-owned enterprises are afforded the opportunity to participate in the provision of spectrum-based services. To that end, CIRI filed extensive Comments and Reply Comments regarding the application of the minority preference provisions mandated by Congress<sup>3</sup> and proposed by the Commission in its spectrum auction rulemaking. See Implementation of Section 309(j) of the Communications Act Competitive Bidding, Notice of Proposed Rulemaking, PP Docket No. 93-253, 8 FCC Rcd 7635 (1993) ("Spectrum Auction NPRM").

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Islanders to be socially disadvantaged for the purposes of determining eligibility for certain SBA-related preference programs. See 13 C.F.R. § 124.105 (1993). Congress has found Alaska Native Corporations to be economically disadvantaged minority business enterprises. 43 U.S.C.A. § 1626(e) (West Supp. 1993).

<sup>3</sup> New Section 309(j)(3)(B) of the Communications Act of 1934 directs the Commission to "promote . . . the following objectives [including] disseminating licenses among a wide variety of applicants including . . . businesses owned by members of minority groups and women." Similarly, Section 309(j)(4)(C) requires the Commission, in promulgating its regulations, to "prescribe area designations and bandwidth assignments that promote . . . economic opportunity for a wide variety of applicants, including . . . businesses owned by members of minority groups and women." Most significantly, Section 309(j)(4)(D) directs the Commission to "consider the use of tax certificates, bidding preferences, and other procedures" to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services . . . ." Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 312, 387 (1993).

CIRI's Comments are included as Appendix 1 and CIRI's Reply Comments are listed in Appendix 2.

In those Comments and Reply Comments, CIRI demonstrated that the minority preference provisions mandated by Congress and proposed by the Commission will pass constitutional muster on review. As the Commission determined in the Spectrum Auction NPRM, intermediate constitutional scrutiny will be applied by a court reviewing the proposed preferences. Spectrum Auction NPRM, 8 FCC Rcd at 7646. As the Commission recognized in its recent Second Report and Order,<sup>4</sup> a court applying intermediate scrutiny to preferential measures examines whether the measures (1) serve important governmental interests within the power of Congress, and (2) are substantially related to achievement of those objectives. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 564 (1990). These preferences pass constitutional muster if they satisfy both prongs of the test.

The preferential measures mandated by Congress in this instance satisfy both prongs of the intermediate scrutiny test. As demonstrated below, Congress has a particularly compelling interest in ensuring that minorities are able to participate in the provision of telecommunications services. In enacting the Section 309(j) preferences, Congress was

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<sup>4</sup> Implementation of Section 309(j) of the Communications Act — Competitive Bidding, Second Report and Order, FCC 94-32, at ¶ 296 (rel. April 20, 1994) ("Second Report and Order").

combatting widespread minority disadvantage and underrepresentation in the Communications industry. Moreover, Congress has directed the FCC to consider measures that are necessary to increase the participation of minorities in the provision of spectrum-based services<sup>5</sup> and the preferences will be narrowly tailored to their goal.<sup>6</sup>

## II. THE NEED FOR PREFERENTIAL MEASURES

Echoing the determination by Congress that preferential measures were warranted to increase minority participation in services such as PCS, several panelists suggested that steps are needed to see that minority-owned businesses have access to the capital needed to acquire and construct a viable PCS network.<sup>7</sup> To be certain, preferential measures are needed to

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<sup>5</sup> CIRI urges the Commission to consider a host of preferential measures to foster minority participation in the provision of PCS, including a spectrum block set-aside, combinatorial bidding, bidding preferences, and installment payments. See Appendix 3 for an enumeration of the preferential measures supported by CIRI.

<sup>6</sup> The FCC has adopted a strict eligibility requirement so that only businesses in which minorities hold a 50.1 percent equity stake and a 50.1 percent controlling interest can qualify as businesses owned by members of minority groups for the purposes of a spectrum auction preference. FCC Adopts Rules to Implement Competitive Bidding to Award Spectrum Licenses (PP Docket No. 93-253), Mimeo No. 42053 (rel. March 8, 1994). That requirement will ensure that only legitimate designated entities will be able to participate in the preference program.

<sup>7</sup> See, e.g., Oral Statement of John E. Oxendine, at 255-56; Written Statement of Mark A. Roberts, at 3-4. The Commission's Small Business Advisory Committee pinpointed the lack of access to capital as a principal barrier to

see that minorities can play a role in the development and provision of the national PCS network.

For example, CIRI's shareholders face a host of socioeconomic disadvantages that are due in large measure to the lingering effects of past discrimination against Alaska Natives. According to a 1993 report by the United States Department of Commerce, only 58 percent of Alaska Native families consist of a husband and wife, compared with 80 percent of all families in Alaska. Indeed, the proportion of families with a female householder and no husband present was twice as high among Alaska Natives as among Alaska's total population. Bureau of the Census, United States Department of Commerce, We the First Americans 15-17 (1993) (the figures are based on the 1990 Census of Population and Housing).

Moreover, only 4 percent of Alaska Natives receive Bachelor's degrees, compared with 23 percent statewide, and only 63 percent of Alaska Natives over the age of twenty-five have completed high school while the statewide total is 87 percent. Just 56 percent of Alaska Natives are in the State labor force and the median income in 1989 for Alaska Natives was 43 percent lower than the median income for the State as a whole. Twenty-three percent of all Alaska Natives live below the poverty line.

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complete minority participation in the provision of services such as PCS. Report of the FCC Small Business Advisory Committee to the Federal Communications Commission Regarding GEN Docket 90-314, 1-5 (Sept. 15, 1993).

This lack of opportunity is prevalent in the communications field as well. Although telecommunications is a dynamic area of our national economy, members of minority groups have encountered unique barriers to ownership of telecommunications facilities with its corresponding economic benefits. For example, as of December, 1993, the cellular telephone services industry in the United States had 16 million subscribers, representing a 45 percent increase over the 1992 figures and a 112 percent increase over 1991. The industry also recorded \$10.9 billion in 1993 service revenues.<sup>8</sup>

Similarly, the radio paging industry reached 8.1 million subscribers in 1989, which was a 17 percent increase over the previous year. One industry participant forecasted a 19 percent annual growth rate through 1993. Minority Business Development Agency, U.S. Department of Commerce, A Market Analysis of the Telecommunications Industry — Opportunities for Minority Businesses 27 (1991).

At the same time, however, firms owned by members of minority groups comprised only 0.5 percent of all firms in the Standard Industrial Classification ("SIC") codes covering radiotelephone and telephone communications services. Indeed, the United States Commerce Department found just one minority business enterprise that operated a cellular telephone service

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<sup>8</sup> Cellular Telecommunications Industry Association, The Wireless FactBook (1994).

in 1991, and just one that provided radio paging service. Id. at 1-2. Only eleven minority businesses distribute cellular equipment. Id. at 2.

Although data on minority participation is not available for an emerging service such as PCS, the lack of economic opportunity for minorities is evident across the telecommunications spectrum. In the commercial broadcast field,<sup>9</sup> for example, minorities owned only 2 percent of all television broadcast and AM and FM radio broadcast stations in 1992. Indeed, Native Americans owned only five of the 10,834 commercial broadcast stations licensed in the United States in that year, while African-Americans, Hispanic-Americans, and Asian-Americans owned a combined total of 303 facilities. Minority Telecommunications Development Program, U.S. Department of Commerce, Compilation By State of Minority-Owned Commercial Broadcast Stations (1992). This meager involvement in the broadcast field is particularly striking in light of the fact that the Commission has had a minority preference program in place since 1978. See Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979 (1978).

Against this background of minority disadvantage and underrepresentation in the telecommunications industry ranks,

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<sup>9</sup> For more information on the lack of opportunity for minorities in the commercial broadcast field, see Appendices 5-11.

Congress determined that minority groups should be afforded enhanced opportunities to participate in the provision of PCS and other spectrum-based services. Affording greater economic opportunity to these groups in this fashion is an important governmental purpose and the measures proposed by the Commission are substantially related to that purpose. Thus, the minority preferences contemplated for the Commission's spectrum auction regime will pass constitutional muster.

### **III. PREFERENCES BASED ON DISADVANTAGE RATHER THAN ON RACE OR GENDER**

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CIRI urges the Commission to see that the congressional directive to ensure that the designated entities have an opportunity to participate in the provision of spectrum-based services is fulfilled by granting preferences to businesses owned by those who are disadvantaged.<sup>10</sup> Under such a system a preference would not be given solely on the basis of race or gender, nor would it be given solely on the basis of size. Rather, a preference would be given to an entity that could demonstrate that it was disadvantaged. In that way, the grant of a preference would not raise constitutional concerns, but would still comport with the intent of Congress to afford

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<sup>10</sup> In its Reply Comments in the spectrum auction rulemaking, CIRI demonstrated that the goal of Congress in mandating the Section 309(j) preferences was to ensure the participation of groups that are disadvantaged by the presence of unique barriers to their participation in the telecommunications industry. See Appendix 2 at 7-8.



greater opportunity to the entities designated in Section 309(j). In any event, the Commission should adopt "additional tailoring mechanisms" to ensure that its preferences are not over-inclusive and that they are narrowly tailored such that only legitimate minority-owned firms can obtain preferences."

Given the limited time in which the Commission must establish an auction regime, and the necessity of having a standard that is easy to administer, the Commission should employ a time-tested standard with strict eligibility rules to implement this preference policy. Specifically, CIRI urges the Commission to look to the standards already established by the U.S. Small Business Administration ("SBA") for determining whether a business is "socially and economically disadvantaged" for the purposes of admission to the SBA Minority Small Business and Capital Ownership Development Program, otherwise known as the "8(a)" program. These existing standards would be particularly useful to the Commission in establishing a preference system geared to the disadvantaged nature of the particular business entity, not simply to the size of the entity. The standards are set forth at 13 C.F.R. §§ 124.105 & 124.106 (1993).

CIRI has included with this statement copies of the SBA standards adapted for use by the Commission in administering the preference program mandated by Congress. The adapted

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<sup>11</sup> See Second Report and Order, at ¶¶ 296-97.

standards (fashioned "Proposed FCC Regulations") present no substantive changes to the SBA 8(a) regulations. Rather, the adapted standards are simply streamlined and tailored for use by the Commission in administering the forthcoming preference program. The standards are listed in Appendix 4.

#### IV. CONCLUSION

CIRI is eager to see that minority-owned enterprises are afforded the opportunity to participate in the provision of spectrum-based services. The need for preferential measures is plain, and the steps suggested by Congress will pass constitutional muster. CIRI also encourages the Commission to consider offering preferences based on minority disadvantage rather than on minority status alone. In that way, the Commission can provide equal opportunities for a variety of providers and remain true to the intent of Congress.

Respectfully submitted,

  
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April 22, 1994

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In the Matter of )  
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Implementation of Section 309(j) ) PP Docket No. 93-253  
of the Communications Act )  
Competitive Bidding )

To: The Commission

COMMENTS

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Dated: November 10, 1993

## SUMMARY

Cook Inlet Region, Inc. ("CIRI"), an Alaska Regional Corporation established by Congress, files these Comments on the Commission's proposals to implement a method of competitive bidding for spectrum-based licenses. As both an FCC-recognized minority-controlled entity and one whose members meet the Small Business Administration's definition of economically and socially disadvantaged, CIRI and its members are among Congress' intended beneficiaries of the "designated entity" preferences required by the recently-enacted Section 309(j) of the Communications Act. In these Comments, CIRI generally endorses the minority preferences the Commission has proposed, but recommends a number of additions or modifications to those proposals to better satisfy Congress' intent in making certain that any preferences flow only to Congress' intended beneficiaries.

As a threshold matter, CIRI demonstrates herein that the proposed minority preferences will pass constitutional muster under Metro Broadcasting's two-pronged intermediate scrutiny test. First, the congressional goal of providing economic opportunity for minority entities is supported by adequate congressional findings and has been found before to be an important governmental purpose. Second, the proposed preferential measures are substantially related to the achievement of the congressional goal since ensuring minority participation in the provision of spectrum-based



services will almost certainly provide economic opportunity for those entities. Nevertheless, the Commission must establish provisions for "exemption" of non-legitimate designated entities (i.e., strict eligibility requirements) and "waiver" of set-asides where no qualified designated entities apply.

As a bona fide minority-controlled entity, CIRI is sensitive to the need for strict eligibility and anti-sham requirements in any regime involving minority preferences. Specifically, CIRI urges the Commission to require that, in order for an applicant to qualify for a minority preference:

- (1) minorities must have clear structural control over the applicant (e.g., 51% voting control in corporate entities, bona fide general partnership status in limited partnerships);
- (2) minorities must have a minimum equity stake in the applicant (not less than 20%);
- (3) the minority's equity stake must not be subject to provisions which bring the minority's involvement into question (e.g., a "call" on its stake by non-minorities);
- (4) the applicant must disclose, in easily discernible terms, how it meets each part of the eligibility test; and
- (5) the applicant must certify it meets the eligibility test and be subject to civil, criminal and administrative sanctions if the certification is found to be false.

As to the nature of the preferences to be employed, the Commission should utilize a wide array of measures to satisfy the congressional mandate. First, setting aside certain blocks of spectrum would certainly help to meet the

congressional goal of ensuring designated entity participation. The Commission must ensure, however, that the set-aside blocks are economically and technically viable ones. To avoid creating a "spectrum ghetto" in the proposed 20 MHz and 10 MHz PCS set-aside blocks -- which by themselves may not be attractive to potential co-venturers -- the Commission must permit combinatorial bidding on the set-aside blocks, authorize designated entities to aggregate a 20 MHz block with a 30 MHz block or with blocks held by in-region cellular operators (aggregations otherwise prohibited by the Commission's PCS Order) and consider reclassifying the set-aside 20 MHz block for MTA service.

Second, CIRI supports the Commission's proposal to utilize bidding preferences and suggests discounting the price payable by a designated entity by a predetermined factor based on the degree of minority participation in the entity.

Third, CIRI supports the Commission's proposal to offer installment payment plans to designated entities. However, the Commission should require a short repayment term (e.g., five years) and should employ a low interest rate for the installment plans such that the government does not make money on the "loans" to minorities. Finally, CIRI supports the Commission's proposal to employ tax certificates in the context of spectrum auctions.

In discussing the scope of minority preference provisions the Commission suggests it might limit

preferences to small businesses, to avoid what might be challenges to race or gender-based preferences. The Commission cannot take such an approach without contravening Congress' mandate to make available preferences to "small businesses" generally and "businesses owned by minority groups and women" (regardless of whether they are "small businesses").

In any event, if despite the sound constitutional basis upon which the proposed preferences rest and the clear congressional directive to adopt preferences for minority and female-owned businesses, the Commission is not disposed to adopt race or gender-based preferences, it can still satisfy the congressional mandate by awarding preferences to businesses owned by entities which are economically disadvantaged and therefore have been traditionally underrepresented in key segments of industry, including telecommunications.

As the Commission proposes, preferences available to rural telcos should be limited to license areas that coincide with the rural telco's local operating area since that would comport with Congress' intent. For the same reason, the Commission should make minority preferences available outside of the set-aside spectrum blocks. Offering installment payments and tax certificates to designated entities bidding on all spectrum blocks will help to avoid relegating designated entities to highly insulated service opportunities in the set-aside 20 and 10 MHz blocks.

CIRI supports the Commission's proposal to make preferential measures available to minority-inclusive consortia. This will encourage partnering between minority and non-minority firms and will help to increase economic opportunity for designated entities. However, the same strict eligibility requirements used to determine whether an applicant is an eligible "minority" should be applied to any consortium which wants to take advantage of minority preferences.

Finally, CIRI believes that the Commission must adopt strong safeguards to prevent the unjust enrichment of entities interested only in speculating on the value of Commission licenses. The Commission must ensure that only serious and qualified bidders participate in spectrum auctions by employing strict financial qualification standards and applying them across-the-board to all applicants (including minorities and other designated entities), by requiring a substantial up-front payment to enter an auction and prompt payment of a deposit on any licenses awarded in the auction, and by limiting the use of installment payment plans only for designated entities. CIRI opposes the use of a royalty plan because it would be too costly and intrusive to administer. Finally, CIRI favors a bright-line two year anti-trafficking restriction, but recommends that the restriction be waived for sales to other designated entities.

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In the Matter of )  
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Implementation of Section 309(j) ) PP Docket No. 93-253  
of the Communications Act )  
Competitive Bidding )  
  
To: The Commission

Cook Inlet Region, Inc. ("CIRI"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, submits these Comments in response to the above-captioned Notice of Proposed Rule Making ("NPRM") adopted by the Commission on September 23, 1993 and released on October 12, 1993.

This proceeding represents a watershed event in the history of the Commission. Pursuant to the authority vested in it by the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"),<sup>1</sup> the Commission is finally able to address effectively an issue which it has confronted on numerous

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occasions in the past: how to efficiently, fairly and without administrative or judicial delay, allocate scarce spectrum resources and award licenses to those who place the highest value on such licenses while, at the same time, ensuring that real opportunities for businesses owned by minority groups -- as well as other economically-disadvantaged entities -- are provided. Congress has directed the Commission to structure a competitive bidding system which achieves: (1) the development and rapid deployment of new technologies, products and services; (2) promotion of economic opportunity for certain disadvantaged groups which are underrepresented in ownership of spectrum licenses today; (3) recovery for the public of a portion of the value of the electromagnetic spectrum and (4) efficient and intensive use of the spectrum.<sup>2/</sup>

CIRI is one of the thirteen Regional Corporations established by Congress under the terms of the Alaska Native Claims Settlement Act ("ANCSA"). 43 U.S.C. §§ 1601 et seq. (1971). CIRI is owned by approximately 6,500 Athabascan, Eskimo, Aleut, Haida, Tlingit and other Native American shareholders. A majority of those shareholders are women. Under definitions applied by the Small Business Administration ("SBA") CIRI's members are both "socially" and "economically disadvantaged" for purposes of applying

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<sup>2/</sup> See Section 309(j)(2)(B). See also Section 309(j)(4).



SBA rules and regulations.<sup>3/</sup> As both an FCC-recognized minority-controlled entity and an organization whose members are deemed to be "disadvantaged" by the SBA and therefore are among the intended beneficiaries of the Budget Act's preference provisions, CIRI has a vital interest in ensuring that the enhanced opportunities for minorities and small businesses to participate in spectrum-based services mandated by the Budget Act are reflected in the Commission's final auction scheme. For this reason, CIRI's Comments focus primarily on the Commission's proposals concerning the role that "designated entities" can and should play in the competitive bidding regime to be adopted by the Commission.<sup>4/</sup>

In particular, CIRI will first address the Commission's minority preference proposals,<sup>5/</sup> including the reasons why

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<sup>3/</sup> Each of the thirteen Regional Corporations is, in essence, a congressionally-compelled economic aggregation of persons of Alaska Indian, Eskimo, or Aleut blood, all of which are disadvantaged. See ANCSA, § 7, 43 U.S.C. § 1606(d) 1988; 13 C.F.R. Part 124.

<sup>4/</sup> Unless otherwise indicated, CIRI's Comments will deal with proposals to enhance the role of minority groups (as opposed to other "designated entities") in spectrum-based services. Moreover, because Personal Communications Services ("PCS") licenses must be awarded soon, CIRI discusses in detail how the Budget Act's mandate with respect to minority group participation applies to the Commission's proposals for PCS licensing. See Second Report and Order in GEN. Docket No. 90-314, FCC 93-451, (rel. September 23, 1993) ("PCS Order").

<sup>5/</sup> CIRI will use the term "minority preference" as a shorthand expression encompassing the variety of proposals which would enhance the opportunities of minorities to